Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services	)	CC Docket No. 96-152

AT&T CORP. REPLY COMMENTS ON FURTHER NOTICE OF PROPOSED RULEMAKING

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SUMMARY

The FNPRM seeks comment as to when a BOC should be deemed to "control" or have a "financial interest" in the content of information disseminated over its basic telephone service, so as to trigger § 274's separation requirements. Despite the fact that all of the commenters in this proceeding save AT&T are BOCs, their comments share little common ground, suggesting a wide range of proposed definitions for these terms, none of which would prove adequate to prevent the types of anticompetitive behavior § 274 is intended to deter. The divergent views expressed by the BOCs provide strong support for AT&T's contention that the Commission should not attempt exhaustively to catalog the wide variety of dealings that would give rise to "control" of, or a "financial interest" in, information. Instead such arrangements -- like other aspects of § 274 -- will "involve a fact-specific analysis that is best-performed on a case-by-case basis." (¶ 48).

The Commission should adopt the FNPRM's proposal that a BOC "controls" information if it either has an ownership interest in it, or seeks to "limit the types of information to which its gateway connects." (¶ 244). In order to determine whether a BOC has a "financial interest" in information, the Commission should reject the FNPRM's proposal in favor of an approach that mirrors that adopted in the Alarm Monitoring Order. Dealings between a BOC and an information provider using its "gateway" service would constitute an impermissible "financial interest" if they cause those entities' interests to become intertwined. In order to deter and detect such arrangements, the Commission should require a BOC that seeks to provide gateway services on a non-separated basis to make available for public inspection any agreements that it enters into with information providers to which its gateway directly links.

Finally, there is consensus support among the commenters for the FNPRM's proposed interpretation of § 274(b)(3)(B), and the objections offered to that proposal are insubstantial.

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Pursuant to Section 1.415 of the Commission's Rules and the First Report and Order and Further Notice Of Proposed Rulemaking ("FNPRM") released February 7, 1997,[1] AT&T Corp. ("AT&T") hereby submits its reply comments concerning the FNPRM's proposed implementation of § 274's separation requirements.[2]

1 First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152, FCC 97-35, released February 7, 1997 ("FNPRM").

2 A list of parties submitting comments and the abbreviations used to identify them are set forth in an appendix to these reply comments.

I. THE COMMENTS CONFIRM THAT THE REQUIREMENTS FOR "CONTROL" OR "FINANCIAL INTEREST" UNDER § 274 SHOULD BE DETERMINED ON A CASE-BY-CASE BASIS

The First Report and Order in this proceeding concludes that "a BOC engaged in the provision of electronic publishing is subject to section 274 only to the extent that it controls or has a financial interest in the content of the information being disseminated over its basic telephone services."[3] The FNPRM seeks comment on how the Commission should define "control" and "financial interest" pursuant to this standard.[4]

The comments suggest a wide range of proposed definitions for these terms. Although many of these proposals are plainly too narrow, the commenters' inability to agree even on the broad outlines of appropriate standards (despite the fact that all except AT&T are BOCs), provides strong support for AT&T's contention that the Commission should refrain from adopting rigid standards at this time.[5] The adoption of inflexible rules is virtually certain to prompt efforts to structure compensation and ownership arrangements designed to circumvent those rules. For instance, a focus on prohibiting equity ownership could prompt contractual

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3 Id., ¶ 242 (emphasis added); see also id., ¶ 49.

4 U S West apparently seeks to argue that the Commission should use a different standard altogether to determine whether a BOC is engaged in electronic publishing. See U S West, pp. 3-5. However, U S West did not seek reconsideration of the First Report and Order, and the propriety of the Commission's "control" and "financial interest" standards is not at issue in this proceeding. U S West also strays far from the obvious bounds of the FNPRM when it argues that a BOC engages in electronic publishing when it "has, or has caused to be originated, authored, compiled, collected or edited" the information described in 274(h)(1). U S West, pp. 6-7. In fact, § 274(h)(1) expressly defines "electronic publishing," and U S West's extra-statutory definition is simply irrelevant.

5 See AT&T, p. 4.

arrangements calling for unreasonably large payments of "royalties" or some other compensation in an effort to work around that prohibition. This potential problem is made all the more acute by the fact that the Internet and other information services technologies are changing very rapidly and often unpredictably -- as are the alliances between companies providing such services. The Commission should not attempt exhaustively to catalog the wide variety of dealings that would give rise to "control" of, or a "financial interest" in, information, because such arrangements -- like other aspects of § 274 -- will "involve a fact-specific analysis that is best-performed on a case-by-case basis."[6]

Control. The majority of commenters appear to agree with AT&T that while "ownership" of information is one way in which a BOC could exercise control over it, ownership is not a sufficient criterion in itself. Bell Atlantic and NYNEX, like AT&T, recognize that "[w]hat constitutes control will vary depending upon the particular arrangement."[7] Ameritech is the sole commenter to argue that "control" should be defined simply as possession of an ownership interest. It contends that control of information rests exclusively with the "owner of the intellectual property in that information, such as the copyright holder...."[8] This definition plainly is too limited. To take just one example, a BOC could hold an exclusive license to use or

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6 FNPRM, ¶ 48. See also SBC, p. 3 (arguing Commission should not establish "a specific list of control/financial interest criteria").

7 Bell Atlantic / NYNEX, p. 2. These BOCs also offer the utterly unsupported claim that control "often will require a majority ownership interest in such content." Id., pp. 2-3. Such ipse dixit provides no basis for the Commission to interpret "control" in that manner.

8 Ameritech, p. 2.

transmit particular content without holding the copyright, and by such an arrangement would plainly have the ability to control that information in any ordinary sense of the word.

SBC offers a detailed list of functions that it contends a BOC could exercise without being deemed to "control" information, but its claims cannot withstand even minimal scrutiny. First, SBC argues that a BOC must be allowed to "compile" and "abstract" information.[9] However, unless these activities were sufficiently minimal to constitute "fair use" under federal copyright law, a BOC could not perform them without obtaining a license to use the work in question.[10] Moreover, SBC asserts that "control" should be found if a BOC has the ability to "edit the content of information." By any ordinary usage, "compiling" and "abstracting" necessarily require "editing." No reasonable construction could deem such functions to be merely an element of providing a § 274(h)(2)(C) "gateway to an information service."

SBC also argues that BOCs should be permitted to "format" the information they present, including changing the "mode" or "media" of the communication, because doing so would not "affect the content of the information communicated in any way."[11] This claim does not -- and cannot -- account for the fact that § 274(h)(2)(c) expressly provides that "gateway" services must not alter the "presentation of ... [an] electronic publishing service to users." (emphasis added). Efforts to alter the format of information are thus expressly prohibited by that section, except for limited functions such as "protocol conversion" that do not affect the visual, aural, or textual information reaching an end-user.

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9 See SBC, p. 6.

10 See 17 U.S.C. § 107.

11 See SBC, p. 6.

As AT&T showed in its comments, in addition to looking to whether a BOC has an ownership interest in information accessible via its gateway, the Commission should adopt the FNPRM's proposal that a BOC "controls" information if it seeks to "limit the types of information to which its gateway connects."[12] Ameritech argues that such a standard would prevent it from excluding obscenity and other objectionable material;[13] but, as AT&T stated in its comments, the Commission can easily craft a rule that would permit a BOC to exclude information such as child pornography or certain threats which would violate the law if transmitted.[14] SBC suggests at page 7 of its comments that a BOC should not be deemed to limit access to information if a consumer could obtain that same content by any other means. Such a standard is untenable on its face, as it would allow BOCs to restrict access to any information except that to which they held exclusive rights.

In stark contrast to SBC's claims that it can dictate exactly the content it will provide to its customers, BellSouth makes the more tenable contention that a BOC should be able "to determine which information sources will be featured on its gateway."[15] AT&T agrees that, for example, a BOC's home page can feature only a relatively small number of hypertext "links," and the BOC necessarily will have to pick and choose among the many World Wide Web sites to which it could provide links. However, a BOC should not be permitted to impose filters that

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12 FNPRM, ¶ 244. See AT&T, p. 3.

13 Ameritech, p.2.

14 AT&T, p. 3, n.4.

15 BellSouth, p. 4.

would prevent customers using its gateway service from accessing certain information or specific IPs. For instance, a BOC could seek to block its subscribers' access to certain web pages, such as those of its competitors or critics.[16] In addition, as discussed below, the Commission's "financial interest" standard should be construed to prohibit some arrangements in which a BOC obtains payment for directing its gateway customers to a particular information service provider.

Financial Interest. BellSouth concurs with AT&T that the FNPRM's proposed definition of "financial interest" adds nothing to the "ownership" test which the Commission proposes to define "control."[17] In addition, BellSouth agrees that a test based on a BOC's percentage ownership of the information provided via its services would be "impossible to administer."[18]

Instead, as AT&T showed in its comments, the Commission should recognize that the ordinary meaning of the term "financial interest" extends to far more than ownership. The Commission's Second Report and Order in this docket recognizes that in the context of alarm monitoring services, "there may be certain situations where a BOC is not directly providing ... service, but its interests are so intertwined with the interests of an alarm monitoring service

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16 There is, for example a "NYNEX Sucks" web page, which purports to catalogue complaints from dissatisfied NYNEX customers. (http://www.nynexsucks.com).

17 BellSouth, p. 4; see also AT&T, pp. 5-6.

18 BellSouth, pp. 2, 4; see also AT&T, pp. 5-6. Ameritech argues at page 2 of its comments that ownership stake of 10% or less would not give rise to "control," but it provides no basis of any kind for this assertion. U S West adverts to § 274(i)(8)'s definition of "own" as a basis for a 10% de minimis threshold, but fails to explain why a definition expressly applicable only "with respect to [ownership of] an entity" is relevant to a BOC's financial interest in information. See U S West, p. 10.

provider that the BOC may be itself considered to be engaged in the provision of alarm monitoring...."[19] Accordingly, in that order the Commission announced its intention to "examine sales agency and marketing arrangements between a BOC and an alarm monitoring company on a case-by-case basis to determine whether they constitute the 'provision' of alarm monitoring service."[20]

Similarly, a BOC's dealings with IPs can take myriad forms, some of which would plainly give the BOC an impermissible financial interest in the information provided via its gateway. In § 274, Congress expressly mandated that BOCs must provide electronic publishing via separated affiliates or qualifying joint ventures, and specified separation requirements applicable to such services. The Commission's rules should be sufficiently flexible to encompass arrangements by which BOCs may seek to evade § 274(c)(1)'s restrictions on joint marketing, subsidize non-regulated businesses, or engage in other anticompetitive activities which § 274 is expressly intended to prohibit.

The standards proposed by the BOC commenters simply would not effectively prevent BOCs from obtaining an impermissible "financial interest" in information transmitted via their gateways. SBC contends that a BOC must have an "intellectual property right" in information in order to have a financial interest in it.[21] As a preliminary matter, SBC fails to

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19 Second Report and Order, Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152, FCC 97-101, released March 25, 1997, ¶ 38 ("Alarm Monitoring Order").

20 Id.

21 See SBC, p. 7.

further define its proposed standard, and it is thus far from clear what sort of interest might amount to an "intellectual property right" in SBC's view. In any event, it is clear that a BOC could structure commission payments, licensing agreements, or other arrangements so as to avoid taking an "intellectual property right," while still intertwining its interests with those of information providers using its gateway.

BellSouth and Ameritech both argue that BOCs should be permitted to collect fees from information providers, but neither explains precisely what types of arrangements they believe would be acceptable.[22] AT&T agrees that it would be reasonable to permit a BOC to impose some charges on both end-users of its gateway service and IPs that use that gateway as a means to reach those users. However, a BOC plainly would have a financial interest in the information accessed via its gateway if it received a commission based on the number of its subscribers that it directed to a particular IP, or otherwise received remuneration based on the particular information its users accessed. Alternatively, rather than basing its fees on its success in channeling subscribers to an IP, a BOC could negotiate an exorbitantly high flat payment from that IP, with a sub silentio understanding that the BOC would attempt to direct its subscribers to that service. Additional, highly complex arrangements could easily be devised, each of which would, in effect, make the BOC a joint-venturer with that IP by giving it a financial interest in the success of the IP's business and in the information it transmitted.

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[22] See Ameritech, p. 3; BellSouth, p. 5. BellSouth argues that it has an "inherent right" to collect fees from IPs that use its gateway, but fails to offer any explanation of the source of that purported right.

In order to help prevent such abuses, the Commission should require a BOC that seeks to provide gateway services on a non-separated basis to make available for public inspection any agreements it enters into with IPs to which its gateways directly links. Such a disclosure requirement would deter efforts by the BOCs to evade the separation requirements of § 274 and promote the detection of such violations should they occur. The Commission could impose these disclosure obligations in conjunction with § 274(b)(3)(B) reporting, and could establish the same rules and procedures for both types of disclosure.

II. THE COMMISSION SHOULD ADOPT THE FNPRM's PROPOSED INTERPRETATION OF SECTION 274(b)(3)(B)

The commenters generally support the FNPRM's proposed interpretation of § 274(b)(3)(B). Those parties that address the issue agree unanimously that the Commission should adopt the same definition of "transaction" pursuant to § 274(b)(3)(B) that it adopted for purposes of § 272(b)(5).[23] Only Bell Atlantic and NYNEX dispute the FNPRM's conclusion that § 274(b)(3)(B)'s disclosure requirements apply to both contracts and tariffs, and they do not even attempt to provide any justification for their proposed interpretation, which, as AT&T showed in its comments, is plainly not in keeping with the intent of that section.[24]

U S West contends that because § 274 addresses electronic publishing, § 274(b)(3)(B) requires disclosure only of contracts which "concern the provision of an electronic publishing service."[25] This reading is inconsistent with both the plain language of the statute --

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23 See FNPRM, ¶ 251; AT&T, p. 8; Bell Atlantic / NYNEX, pp. 4-5; SBC, p. 8.

24 Compare Bell Atlantic / NYNEX, p. 5 with AT&T, pp. 6-7.

25 U S West, pp. 16-18.

which addresses "transactions" without limitation -- and with the intent of § 274. It is clear that a BOC could subsidize its affiliate's electronic publishing operations not only through transactions relating to that particular service, but through dealings for any goods or services -- and the statute reflects this concern. If U S West wishes to shelter from § 274(b)(3)(B)'s disclosure requirements transactions that involve businesses unrelated to electronic publishing, it is free to operate those businesses through affiliated entities not subject to § 274.

Finally, no commenter opposes the FNPRM's proposal to adopt the same procedures for making contracts between BOCs and their § 274 affiliates "publicly available" as those the Commission adopted under § 272(b)(5).[26] Bell Atlantic and NYNEX suggest that summaries of contracts between BOCs and their § 274 affiliates be posted on the Internet "30 days after they are signed," while the Commission's rules implementing § 272(b)(5) require such posting within 10 days of the transaction.[27] Their comments do not oppose the FNPRM's 10-day Internet posting proposal, however, and they offer no reason why the interval between completion of a transaction and Internet posting should be longer under § 274 than under § 272. SBC states that making contracts available in a BOC's business offices "would be sufficient," though it does not indicate that it opposes posting summaries of such contracts on the Internet, as required by the Commission's § 272(b)(5) rules.[28]

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[26] See AT&T, p. 7; Bell Atlantic / NYNEX, pp. 5-6; U S West, pp. 12-16.

[27] Bell Atlantic / NYNEX, p. 5.

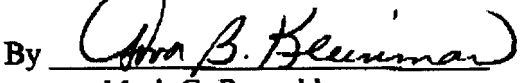
[28] SBC, p. 9.

CONCLUSION

For the reasons stated above and in AT&T's comments, the Commission's proposed rules should be modified prior to adoption.

Respectfully submitted,

AT&T CORP.

By 

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April 25, 1997

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(CC Docket No. 96-152)

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BellSouth Corporation
SBC Communications, Inc. ("SBC")
US West, Inc.

CERTIFICATE OF SERVICE

I, Terri Yannotta, do hereby certify that on this 25th day of April, 1997, a copy of the foregoing "AT&T Corp. Comments on Further Notice of Proposed Rulemaking" was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached service list.

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